

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Permanent
Rules Relating to the Practice of
Psychology: Definitions, Licensure,
Continuing Education and Rules of Conduct,
Minnesota Rules Chapter 7200

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

This matter came before Administrative Law Judge Eric L. Lipman for a rulemaking hearing on Thursday, August 9, 2012. The public hearing was held at 9:30 a.m., in the Pohlad Auditorium of the Hennepin County Public Library, 300 Nicollet Mall, Minneapolis, Minnesota.

The proposed rules relate to the minimum standards for entry into, acceptable practice in, and maintaining licensure for, the practice of psychology. The Minnesota Board of Psychology (the Board) asserts that the current standards for education and training in psychology are "based on outmoded standards" and "allow inadequately trained people to become licensed, resulting in incompetent practice."¹ Further the Board asserts that the proposed revisions to the standards of psychology practice will clarify those rules, and thereby lower the number of complaints of deficient practice and improve results for the public.²

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act.³ The Minnesota Legislature has designed this process so as to ensure that state agencies have met all of the requirements that the state has specified for adopting rules.

The hearing was conducted so as to permit agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss and critique the proposed rules.

The agency must establish that the proposed rules are necessary and reasonable; that the rules are within the agency's statutory authority; and that any modifications that the agency may have made after the proposed rules were initially

¹ See, Exhibit D-1, Statement of Need and Reasonableness (SONAR) at 4.

² *Id.*, at 3-4.

³ See, Minn. Stat. §§ 14.131 through 14.20.

published in the *State Register* are within the scope of the matter that was originally announced.⁴

The agency panel at the public hearing included Angelina M. Barnes, Executive Director of the Board; Leo Campero, Assistant Executive Director of the Board; Chris Bonnell, Chairman of the Board; Dr. Jeffrey Leichter, Board Member; Patricia Orud, Board Member; and Dr. Jack Schaffer, Rules Committee Member.

Approximately eleven people attended the hearing and signed the hearing register. The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules. Seven members of the public made statements or asked questions at the hearing.

After the hearing ended, the Administrative Law Judge kept the administrative record open for another 20 calendar days – until August 30, 2012 – to permit interested persons and the Board to submit written comments. Following the initial comment period, the hearing record was open an additional five business days so as to permit interested parties and the Board an opportunity to reply to earlier-submitted comments.⁵ The hearing record closed on September 7, 2012.

The Chief Administrative Law Judge granted an extension of the time to complete this report until Wednesday, October 10, 2012.

SUMMARY OF CONCLUSIONS

The Board has established that it has the statutory authority to adopt the proposed rules and that the rules are necessary and reasonable.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Nature of the Proposed Rules

1. With this rulemaking process, the Board proposes a “comprehensive revision” to state licensing, accreditation and practice standards for psychologists and psychological practitioners.⁶

2. The Board asserts that there have been a number of changes to the practice of psychology and the methods of educating practitioners that have occurred

⁴ Minn. Stat. §§ 14.05, 14.131, 14.23 and 14.25.

⁵ See, Minn. Stat. § 14.15, subd. 1.

⁶ Ex. D-1 at 8 (SONAR).

since the rules were last amended, in 1991. In the Board's view, the "existing rules do not reflect current standards of regulation or practice."⁷

3. The Board cites Minn. Stat. §§ 148.905 and 148.98 as its source of statutory authority for these proposed rules. These statutes grant the Board authority to make rules for licensing, examinations and training of psychologists and psychological practitioners and for regulating their professional conduct.⁸

4. The Administrative Law Judge concludes that the Board has the statutory authority to adopt rules governing the licensing, examination, training and practice of psychologists and psychological practitioners.

II. Procedural Requirements of Chapter 14

A. Publications

1. On March 7, 2011, the Board published in the *State Register* a Request for Comments seeking comments on its possible amendment to rules governing the practice of psychology. The Request for Comments was published in the *State Register* at 35 *State Register* 1372.⁹

2. On May 30, 2012, the Board requested approval of its Dual Notice of Intent to Adopt Rules With or Without a Hearing (Dual Notice, or Notice of Intent to Adopt) and its Additional Notice Plan.¹⁰

3. By Order dated June 7, 2012, the undersigned Administrative Law Judge approved the Board's Dual Notice and Additional Notice Plan.¹¹

4. The Dual Notice that was published in the June 18, 2012 *State Register*, set July 18, 2012 as the deadline for comments or to request a hearing.¹²

5. On June 18, 2012, the Board sent by U.S. mail a copy of the Dual Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice and to all persons and associations identified in the additional notice plan.¹³

⁷ *Id.*

⁸ Minn. Stat. § 148.905, subd. 1; Minn. Stat. § 148.98.

⁹ Ex. A at 24.

¹⁰ Ex. K-3 at 3.

¹¹ Ex. K-3 at 2.

¹² Ex. F-1 at 8.

¹³ Ex. H- 1 at 1.

6. On June 25, 2012, a copy of the Dual Notice and the statement of need and reasonableness was sent to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over licensure and practice of psychology.¹⁴

7. On July 26, 2012, the Board mailed a copy of the SONAR to the Legislative Reference Library to meet the requirement set forth in Minn. Stat. §§ 14.131 and 14.23.¹⁵

8. The Notice of Hearing identified the date and location of the hearing in this matter.¹⁶

9. At the hearing on August 9, 2012, the Board filed copies of the following documents as required by Minn. R. 1400.2220:

- a. the Board's Request for Comments as published in the *State Register* on March 7, 2011;¹⁷
- b. the proposed rules dated March 20, 2012, including the Revisor's approval;¹⁸
- c. the Board's Statement of Need and Reasonableness (SONAR);¹⁹
- d. the Certificate of Mailing the SONAR to Legislative Reference Library on July 26, 2012.²⁰
- e. the Dual Notice as mailed and as published in the *State Register* on June 18, 2012;²¹
- f. the Certificate of Mailing the Dual Notice to the rulemaking mailing list on June 18, 2012, and the Certificate of Accuracy of the Mailing List;²²

¹⁴ Ex. K-2 at 1.

¹⁵ Ex. E-1 at 1; Letter from *Angelina Barnes* (August 6, 2012).

¹⁶ Ex. F-1 at 8.

¹⁷ Ex. A- 1.

¹⁸ Ex. C-1.

¹⁹ Ex. D-1 (SONAR).

²⁰ Ex. E-1.

²¹ Ex. F-1.

²² Ex. G-1 and G-2.

- g. the Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan on June 18, 2012;²³
- h. the written comments on the proposed rules that the Board received during the comment period following the Dual Notice;²⁴
- i. the Certificate of Sending the Dual Notice and the Statement of Need and Reasonableness to Legislators on June 25, 2012;²⁵ and,
- j. May 31, 2012 memorandum from Minnesota Management and Budget.²⁶

B. Additional Notice Requirements

10. Minn. Stat. §§ 14.131 and 14.23 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.

11. On June 18, 2012, the Board published the Dual Notice of Intent to Adopt in the following manner, according to the Additional Notice Plan approved by the Office of Administrative Hearings:

- The Dual Notice of Intent to Adopt Rules was posted on the Board's website and the Board has maintained these materials continuously since they were posted in June of 2012.²⁷
- A copy of the Dual Notice of Intent to Adopt was sent by first class mail to 4,006 persons and entities – approximately 3,700 of which included current licensees and applicants for licensure.²⁸
- A copy of the Dual Notice of Intent to Adopt was sent by Electronic Mail to more than 100 interested persons for whom the Board had valid electronic mail addresses.²⁹

12. The Administrative Law Judge concludes that the Board has fulfilled its additional notice requirements.

²³ Exs. G-1 at 2 and H-1 at 1.

²⁴ Ex. I-1.

²⁵ Ex. K-2

²⁶ Ex. K-4 at 1.

²⁷ Ex. D-1 at 5 (SONAR).

²⁸ Ex. G-1 at 2-3; Ex. K-3 at 5; *Letter from Anglelina Barnes* (June 8, 2012).

²⁹ Ex. H-1 at 2 through 5; *Letter from Anglelina Barnes* (June 8, 2012).

C. Notice Practice

1. Notice to Stakeholders

13. On June 18, 2012, the Board provided a copy of the Dual Notice of Intent to Adopt to its official rulemaking list (maintained under Minn. Stat. § 14.14), and to some 4,600 other licensees, applicants and stakeholders.³⁰

14. The comment period on the proposed rules expired at 4:30 p.m. on Wednesday, July 18, 2012.³¹

15. There are 30 days between Monday, June 18, 2012 and Wednesday, July 18, 2012.

16. The Administrative Law Judge concludes that the Board did not fulfill its responsibilities, under Minn. R. 1400.2080, subpart 6, to mail the Dual Notice “at least 33 days before the end of the comment period”

17. Those who received the Dual Notice by first class mail did not have “30 days within which to submit comment in support of, or in opposition to, the proposed rule” or to request a hearing on the rules.³²

2. Notice to Legislators

18. On June 25, 2012, the Board sent a copy of the Notice of Hearing and the Statement of Need and Reasonableness to Legislators as required by Minn. Stat. § 14.116.³³

19. Minn. Stat. § 14.116 requires the agency to send a copy of the Notice of Intent to Adopt and the SONAR to certain specified legislators on the same date that it mails its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its additional notice plan.

20. The Board mailed the Notice of Intent to Adopt and the SONAR to the required legislators seven days after the Notice of Intent to Adopt was mailed, and ten days after it should have occurred.³⁴

³⁰ Ex. G-1 at 2; Ex. K-3 at 5; *Letter from Anglelina Barnes* (June 8, 2012).

³¹ Ex. F-1 at 5.

³² Minn. Stat. § 14.22 (1) and (3).

³³ Ex. K-2.

³⁴ Minn. R. 1400.2080, subp. 6

3. Notice to the Legislative Reference Library

21. On July 26, 2012, the Board mailed a copy of the SONAR to the Legislative Reference Library.³⁵

22. Minn. Stat. § 14.23 requires the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.

23. The Board mailed the SONAR to the Legislative Reference Library thirty-eight days after the Notice of Intent to Adopt was mailed, eight days after close of the comment period, and forty-one days after it should have occurred.³⁶

4. Assessment of Notice Practice

24. Minn. Stat. § 14.15, subd. 5 requires an administrative law judge to disregard an error or defect in the proceeding due to an “agency’s failure to satisfy any procedural requirement” if the administrative law judge finds “that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process”

25. The Board’s failure to afford stakeholders and legislators a full 30-days within which to submit comments and to request a hearing on the proposed rules, and its failure to remit the SONAR to Legislative Reference Library while the period for comments and hearing requests was underway, is troubling. However, the Administrative Law Judge concludes that the Board’s late mailings did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process. In this context, it is important to emphasize that the Board mailed a copy of the Dual Notice to all Licensees and Applicants for whom it had an address – more than 3,700 in all – and that more than 25 people later requested a hearing on these rules. Further, the Board’s Rules Committee circulated drafts of its proposed rules as the revisions were in development, holding public meetings on the proposed changes six times in 2011 and once in 2012.³⁷ The vigorous notice plan, transparent drafting process and the fact that a hearing was later scheduled mitigate the impacts of a truncated comment period and a defective filing. For those reasons, these procedural errors were harmless errors under Minn. Stat. § 14.15, subd. 5 (1).

D. Impact on Farming Operations

26. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.

³⁵ Ex. E-1.

³⁶ Minn. R. 1400.2070, subp.3.

³⁷ Ex. D-1 at 5 (SONAR).

27. The proposed rules do not impose restrictions or have an impact on farming operations. The Administrative Law Judge finds that the Board was not required to notify the Commissioner of Agriculture.

E. Statutory Requirements for the SONAR

28. The Administrative Procedure Act obliges an agency adopting rules to address seven factors in its Statement of Need and Reasonableness.³⁸ Those factors are:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals; and
- (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

³⁸ Minn. Stat. § 14.131.

1. The Board's Regulatory Analysis

(1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

29. The Board states that the groups that will be affected by the proposed rules are Licensed Psychologists, applicants for licensure, persons completing required post-degree supervised practice, and consumers of psychological services.³⁹

30. The Board further asserts that while "[t]he costs of the proposed rules for the most part will be borne by licensees and applicants for licensure," these are the same as costs imposed upon licensees or applicants under these existing rules.⁴⁰

31. The Board contends that the licensees, applicants for licensure and the public will all benefit from the proposed changes. Licensees will benefit from the increased practice guidance and the simplification of continuing education requirements. Applicants will benefit from a streamlined the licensure process. The public will benefit by a reduction in resources devoted to complaint resolution, licensure, and continuing education review.⁴¹

(2) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

32. The Board does not project that implementation and enforcement of the proposed rules will result in additional costs to the Board or any other state agency. Because the Board's activities in this area are entirely supported by application fees, it is not anticipated that these rules will affect state revenues.⁴²

(3) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

33. Because a key objective of the proposed rules is to provide licensees and applicants with regulatory guidance that is beyond the broadly phrased statutory

³⁹ Ex. D-1 at 3 (SONAR).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

standards, the Board cannot identify an alternative other than rulemaking to “promulgate rules to govern the practice of psychology....”⁴³

34. In other instances, the Board redrafted its originally-proposed rule so as to meet its regulatory objective in ways that involved fewer compliance costs to regulated parties.⁴⁴

(4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

35. As noted above, because a key objective of the proposed rules is to provide licensees and applicants regulatory guidance beyond the more-broadly phrased statutory standards, the Board could not identify methods other than rulemaking to “promulgate rules to govern the practice of psychology....”⁴⁵

(5) The probable costs of complying with the proposed rules.

36. The probable costs of the proposed rules will be borne by Licensed Psychologists and applicants for licensure. These costs are estimated to be no greater than compliance costs under the current statutory requirements. In many instances, the Board projects that the likely compliance costs will be lower under the proposed rules.⁴⁶

(6) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

37. The Board contends that without the proposed rule changes, it will be unable to stem the recent increases in “inadvertent professional misconduct;” a rise that the Board attributes to “the absence of updated rules of conduct.” Without an opportunity to update and clarify its regulations, the Board predicts both increased expenses to resolve investigations into regulatory violations and the need to raise fees to cover those expenses. Additionally, the Board expresses concern that the public is poorly served by regulatory standards that are “based on outmoded standards of education and training” and “allow inadequately trained people to become licensed.”

⁴³ *Id.*

⁴⁴ *See, id.* at 3-4.

⁴⁵ *Id.*

⁴⁶ *Id.*, at 4.

The Board undertakes the proposed revisions to avoid litigation, costs and potential risks to the public.⁴⁷

(7) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

38. The Board is unaware of any differences between the proposed rule changes and existing federal regulations.⁴⁸

2. Performance-Based Regulation

39. The Administrative Procedure Act⁴⁹ also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.⁵⁰

40. When drafting its proposed modifications to its permanent rules, the Board endeavored to provide sufficiently specific guidance to applicants and licensees so as to "reduce staff time devoted to responding to inquiries and allowing for the most clarity for applicants and licensees in complying with these requirements."⁵¹

3. Consultation with the Commissioner of Minnesota Management and Budget (MMB)

41. As required by Minn. Stat. § 14.131, by letter dated May 31, 2012, the Commissioner of Minnesota Management and Budget (MMB) responded to a request by the Board to evaluate the fiscal impact and benefit of the proposed rules on local units of government. MMB reviewed the Board's proposed rules and concluded that: "These rule changes will have little, if any, fiscal impact on local governments that employ licensed psychologists."⁵²

42. The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules on units of local government. The Board has likewise considered and implemented the legislative policy on performance-based regulatory systems.

⁴⁷ *Id.*, at 4.

⁴⁸ *Id.*

⁴⁹ Minn. Stat. § 14.131.

⁵⁰ Minn. Stat. § 14.002.

⁵¹ Ex. D-1 at 4-5 (SONAR).

⁵² Ex. K-4 at 2.

4. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

43. Minn. Stat. § 14.127, requires the Board to “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.” The Board must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁵³

44. The Board determined that the cost of complying with the proposed rule changes will not exceed \$25,000 for any business or any statutory or home rule charter city.⁵⁴

45. The Administrative Law Judge finds that the agency has made the determination required by Minn. Stat. § 14.127 and approves that determination.

5. Adoption or Amendment of Local Ordinances

46. Under Minn. Stat. § 14.128, the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁵⁵

47. The Board concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules. The Board’s proposed rules should not require local governments to adopt or amend those more general ordinances and regulations.⁵⁶

48. The Administrative Law Judge finds that the agency has made the determination required by Minn. Stat. § 14.128 and approves that determination.

III. Rulemaking Legal Standards

49. The Administrative Law Judge must make the following inquiries: Whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government

⁵³ Minn. Stat. § 14.127, subds. 1 and 2.

⁵⁴ Ex. D-1 at 7 (SONAR).

⁵⁵ Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subds. 2 and 3.

⁵⁶ Ex. D-1 at 7 (SONAR).

officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.⁵⁷

50. Additionally, under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts.

51. In support of a rule, the agency may rely upon materials developed for the hearing record,⁵⁸ “legislative facts” (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy),⁵⁹ and the agency’s interpretation of related statutes.⁶⁰

52. A proposed rule is reasonable if the agency can “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken.”⁶¹ By contrast, a proposed rule will be deemed arbitrary and capricious where the agency’s choice is based upon whim, devoid of articulated reasons or “represents its will and not its judgment.”⁶²

53. An important corollary to these standards is that when proposing new rules an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.⁶³ Thus, while reasonable minds might differ as to whether one or another particular approach represents “the best alternative,” the agency’s selection will be approved if it is one that a rational person could have made.⁶⁴

54. Because both the Board and the Administrative Law Judge suggest changes to the proposed rule language after the date it was originally published in the *State Register*, it is also necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if:

⁵⁷ See, Minn. R. 1400.2100.

⁵⁸ See, *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991).

⁵⁹ Compare generally, *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

⁶⁰ See, *Mammenga v. Board of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

⁶¹ *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

⁶² See, *Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm’n*, 312 Minn. 250, 260-61, 251 N.W.2d 350, 357-58 (1977).

⁶³ *Peterson v. Minn. Dep’t of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. App. 1999).

⁶⁴ *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991).

“the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice;”

the differences “are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice;” and

the notice of hearing “provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.”

55. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider:

whether “persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests;”

whether the “subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing;” and

whether “the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.”

IV. Rule by Rule Analysis

56. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that follows below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the reasonableness of the Board’s regulatory choice or otherwise requires closer examination.

57. The Administrative Law Judge finds that the Board has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.

58. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

7200.0600 – Requirements for Licensure

59. The Board proposed to carry forward the existing procedure requiring submission of “a notarized application for licensure.”⁶⁵

⁶⁵ Ex. F-1 at 14.

60. Commentators on the proposed rule suggested that the requirement for a notarized application – in contrast to other materials obtained by the Board, which merely bear the signer’s attestation – was unnecessary and burdensome.⁶⁶

61. The Board expressed concern that carrying forward the existing rule would maintain an inconsistency in its current practice and did not represent a value to the Board or general public.⁶⁷

62. The Board’s action in deleting the words “a notarized” and substituting the word “an,” in Item B of this rule, is needed and reasonable and would not be a substantial change from the rule as originally proposed.

7200.2035 - Licensure by Mobility

63. The Board proposed to revise the licensure requirements permitting professionals who hold accreditations in other states to obtain licensure in Minnesota. In its original proposal it did not, however, use the term “credential” or reference the “National Register of Health Services in Psychology.”⁶⁸

64. Commentators on the proposed rule suggested that the proposed revisions were too narrowly drawn and unduly limited mobility licensure to providers participating in the National Register.⁶⁹

65. Agreeing, the Board proposes to revise the original proposal by adding the following bolded text:

Subp. 2 Certification of diplomate **or Credential.** The educational requirements of part 7200 1300 the national standardized examination requirement of part 7200 0550 subpart 1 item A, and the postdegree employment requirements of part 7200 2000 shall be considered met if at the time of application the applicant provides acceptable evidence of certification as a current holder of the Certificate of Professional Qualification (CPQ) issued by the Association of State and Provincial Psychology Boards (ASPPB). or of a diplomate from the American Board of Professional Psychology (ABPP), **or a health services provider in psychology credential issued by the National Register of Health Services in Psychology.** An applicant seeking to qualify for licensure under this part who is a graduate of a program that is not APA accredited and earned the degree after adoption of this rule shall meet the human diversity requirement of part 7200.13 00, subpart 5, item A, subitem (1). unit (f).

⁶⁶ See, Board Comments, at 10 (August 28, 2012).

⁶⁷ *Id.*

⁶⁸ Ex. F-1 at 19.

⁶⁹ See, Board Comments, at 4 - 7 (August 28, 2012); Testimony of Dr. Glenace Edwall (August 9, 2012).

66. The Board's action to include the National Register among the certification-issuing organizations that grant its members access to a streamlined credentialing process, is needed and reasonable and would not be a substantial change from the rule as originally proposed.

7200.3610 – Relicensure Following Termination

67. The Board proposed to carry forward the existing procedure requiring submission of "a notarized affirmation" in support of the application for relicensure."⁷⁰

68. Commentators on the proposed rule suggested that the requirement for a notarized affirmation – in contrast to other materials obtained by the Board, which merely bear the signer's attestation – was unnecessary and burdensome.⁷¹

69. The Board expressed concern that carrying forward the existing rule would maintain an inconsistency in its current practice and did not represent a value to the Board or general public.⁷²

70. The Board's action in deleting the words "a notarized" and substituting the word "an," in Item B of this rule, is needed and reasonable and would not be a substantial change from the rule as originally proposed.

7200.3830 – Eligible Continuing Education Activities

71. The Board proposed to revise the methods by which graduate level course studies is eligible for continuing education credit conferred by the Board. Currently, and under the proposed rules, licensees must complete 40 hours of continuing education during each "renewal period" in order to maintain licensure. The Board's original proposal was to reduce the number of credit hours that is now conferred when the graduate course is taken for course credit, from 20 continuation education hours for each academic "credit" to eight continuation education hours for each academic "credit." Additionally, the Board proposed to award four continuation education hours for each academic "credit" hour when a licensee "audited" the graduate-level course.⁷³

72. Commentators on the proposed rule suggested that apportionment of continuation education credits was too low and did not adequately recognize the rigor and difficulty of such coursework.⁷⁴

⁷⁰ Ex. F-1 at 20.

⁷¹ See, Board Comments, at 11 (August 28, 2012).

⁷² *Id.*

⁷³ Ex. F-1 at 21.

⁷⁴ See, e.g., Testimony of Dr. Kenneth B. Solberg (August 9, 2012); Comments of Dr. Janet T. Thomas (August 20, 2012).

73. Agreeing, the Board proposes to restore the deleted language conferring twenty hours of continuing education credit for each academic credit. Additionally, the board proposes to increase the number of hours earned for audited coursework from four hours per credit, to ten hours per credit.⁷⁵

74. The Board's adjustments of the continuing education hours it proposes to confer for graduate-level coursework are needed and reasonable and would not be a substantial change from the rule as originally proposed.

7200.4700 – Protecting the Privacy of Clients

A. Subpart 7a.

75. The Board proposed to require that “[w]hen a provider shares private information about a client for the purposes of consultation or supervision, all client information that might identify the client shall be disguised unless the provider has obtained a signed release of information.”⁷⁶

76. One commentator on the proposed rule suggested that requiring a release prior to undertaking consultation on the case with other professionals could unduly restrict the sharing of treatment-related information and the application of best practices.⁷⁷

77. The Board expressed concern that there may be unintended consequences from the phrasing of this subpart. In response to stakeholder comment, the Board decided to withdraw this proposed rule.⁷⁸

78. The Board's action in withdrawing this proposal is needed and reasonable and would not be a substantial change from the rule as originally proposed.

B. Subpart 7b.

79. The Board proposed to require that “[w]hen a provider shares private information about a client for the purposes supervision, the provider shall obtain a signed release of information.”⁷⁹

80. One commentator on the proposed rule suggested that requiring a release prior to permitting supervision of the practices of more junior professionals could restrict

⁷⁵ See, Board Comments, at 8 - 9 (August 28, 2012).

⁷⁶ Ex. F-1 at 25.

⁷⁷ See, Board Comments, at 2-3 (August 28, 2012).

⁷⁸ *Id.*, at 3.

⁷⁹ Ex. F-1 at 25.

the sharing of treatment-related information, the application of best practices and permit deficient practices to continue.⁸⁰

81. After the hearing, the Board expressed concern that the proposed rule might impede supervision that is needed to assure compliance with the law and prevailing practice standards. In response to stakeholder comment, the Board decided to withdraw this proposed rule.⁸¹

82. The Board's action in withdrawing this proposal is needed and reasonable and would not be a substantial change from the rule as originally proposed.

7200.4710 – Accessing and Releasing Private Information

A. Subpart 1.

83. The Board proposed to include language regarding the rights that state and federal statutes confer upon patients as to their medical information.⁸²

84. While the Board did propose language detailing the patient's right to access medical information, and release it to others, one commentator expressed concern that the chosen language implied that the patient was the person who would be required to make the disclosures of information.⁸³

85. Agreeing, the Board proposes to modify the proposed subpart so as to make the following changes: "A client has the right to access and consent to release of private information maintained by the provider...."⁸⁴

86. The Board's action revising the text is needed and reasonable and would not be a substantial change from the rule as originally proposed.

B. Subpart 2 (G).

87. The Board proposed a rule that would require authorizations for the release of medical information to include "a statement that the release is valid for one year, except as otherwise allowed by law, or for a lesser period of time that is specified in the release."⁸⁵

88. One commentator on the proposed rule suggested that inclusion of the word "lesser" in the proposed rule took the proposal out of alignment with the text of

⁸⁰ See, Board Comments, at 2-3 (August 28, 2012).

⁸¹ *Id.*, at 3.

⁸² Ex. F-1 at 26.

⁸³ See, Board Comments, at 2 (September 5, 2012).

⁸⁴ *Id.*

⁸⁵ Ex. F-1 at 26.

Minn. Stat. § 144.293, subdivision 4. The misalignment, continued commentators, made the rule at odds with the underlying statute and threatened to make any later effort to obtain conforming records much more complicated and expensive.⁸⁶

89. The Board expressed concern that to the extent that the proposed rule included the word “lesser” the authority for the rule would be in doubt. In response to stakeholder comment, the Board has decided to delete the word “lesser” in proposed subpart 2 (G).⁸⁷

90. The Board’s action in deleting the word “lesser” is needed and reasonable and would not be a substantial change from the rule as originally proposed.

C. Subpart 2 (I).

91. The Board proposed a rule to require placement of a specialized statement on release forms used by providers. The statement addressed the rights of patients to rescind consent for the disclosure of health information.⁸⁸

92. One commentator expressed concern that to the extent that this disclosure is not required by the federal privacy regulations found at 45 C.F.R. Part 164, conforming disclosures to Minnesota patients would require use of different and additional forms. Moreover, the commentator maintained that the additional disclosures were not especially valuable because the substance of the same information was transmitted in other standard forms.⁸⁹

93. Agreeing, the Board proposes to modify the proposed subpart 2 (I) so as to delete the words “or that the right to rescind consent has been waived separately in writing”⁹⁰

94. The Board’s proposed deletion is needed and reasonable and would not be a substantial change from the rule as originally proposed.

7200.4720 – Informed Consent

95. The Board proposed to recodify several different regulatory provisions relating to informed consent under a single rule.⁹¹

⁸⁶ See, Board Comments, at 3-4 (August 28, 2012).

⁸⁷ *Id.*, at 3.

⁸⁸ Ex. F-1 at 26.

⁸⁹ See, Board Comments, at 4 (September 5, 2012).

⁹⁰ *Id.*, at 3.

⁹¹ Ex. F-1 at 27.

96. One commentator expressed concern that the rule as drafted did not make clear how (and whether) informed consent should be obtained following an initial consultation by a provider as to a patient's health condition.⁹²

97. Agreeing, the Board proposes to revise the original proposal by adding the following bolded text:

Subpart 1. Obtaining informed consent for services. The provider shall obtain informed consent for services to a client, **provided informed consent is not required for initial consultation to evaluate a client's need for services.** The informed consent may be oral or written, except as provided in subpart 2. The informed consent shall include⁹³

98. The Board's additions to the proposed rule are needed and reasonable and would not be a substantial change from the rule as originally proposed.

7200.4950 – Medical and Other Health Care Considerations

99. The Board proposed a rule which obliged the disclosure of practice limitations as to prescribing medications in certain settings. In the proposed rule, however, the Board did not require such disclosures during the course of discussions with other health care providers.⁹⁴

100. One commentator suggested that the proposed rule was drawn too narrowly. Asserting that only seven percent of psychologists have training in biology and chemistry, which are required for all other prescribing health professionals, and the risks of a health care professional assuming that a licensed psychologist was, in fact, a licensed psychiatrist (with additional medical training) were great, a broader rule was urged.⁹⁵

101. Agreeing, the Board proposes to revise the original proposal by adding the following bolded text:

Providers shall make clear in medication discussions with a client or in a report **or in other communications with other healthcare providers** that the ultimate decision whether to prescribe, alter, or discontinue medication lies solely with a physician or other prescribing healthcare provider.⁹⁶

⁹² See, Board Comments, at 5-6 (September 5, 2012).

⁹³ *Id.*, at 5.

⁹⁴ Ex. F-1 at 31.

⁹⁵ See, Testimony of Dr. William Robiner (August 9, 2012).

⁹⁶ See, Board Comments, at 9 (August 28, 2012).

102. The Board's addition of text to the proposed rule is needed and reasonable and would not be a substantial change from the rule as originally proposed.

V. Additional Actions Urged By Stakeholders

A. 7200.1300 – Residency

103. While, as noted above, the Board made a number of changes to its proposed regulations in response to stakeholder comments, the proposal which received the most vigorous public comment (both supportive and negative) is one that the Board declines to revise. The Board proposes to add new regulations to the existing requirements for "licensure as a licensed psychologist." The Board proposes to add specific requirements for "residency" at an "educational institution through in-person psychological instruction with multiple faculty and students."⁹⁷

104. There are points of agreement as to the proposed rule. For example, the Board and its many commentators agree that a requirement for "residency" at an "educational institution through in-person psychological instruction with multiple faculty and students" is not an explicit part of the current regulations. The Board proposes that applicants for "licensure as a licensed psychologist" have:

A minimum of 24 semester credit hours or 384 clock hours must be earned in residence from the educational institution through in-person psychological instruction with multiple program faculty and students. Acceptable academic residency experience shall be accumulated over a period of 12 consecutive months.⁹⁸

105. There is likewise agreement that it is important that any student who seeks licensure as a psychologist have had course work and training that permits the student to "obtain fluency in the language and vocabulary of psychology ... by frequent and close association with, apprenticing to, and role modeling by, faculty members and other students." Additionally, the psychology profession and the broader public are protected against deficient practice when faculty, training staff, supervisors, and administrators have an opportunity to observe the student in educational and clinical settings and to "assess all elements of student competence."⁹⁹

106. Where the Board and some of its commentators diverge is as to the propriety and reasonableness of a residency requirement that is stated in "clock hours." Expressed in this way, the residency requirement could be satisfied by students who attend educational institutions that blend on-line courses with in-person instruction to meet the training standard. For example, as one commentator testified, because her university structured clinical studies with faculty on workday evenings, on weekends and

⁹⁷ Ex. F-1 at 14-15; see, Board Comments, at 13 - 26 (September 5, 2012).

⁹⁸ Ex. F-1 at 15; See e.g., Board Comments, at 20 (August 28, 2012).

⁹⁹ Ex. D-1 at 33.

in concentrated blocks throughout the year, she could pursue licensure while still maintaining a full-time job.¹⁰⁰

107. Proponents of the rule change assert that it opens opportunities for licensure to older students and non-traditional students. Opponents of the proposed rule assert that permitting a concentrated period within which to observe the progress of psychology students compromises educational standards and, ultimately, will lead to deficient practice.¹⁰¹

108. Through the SONAR, the testimony at the rule hearing, and its response and reply comments during the comment period, the Board made an affirmative presentation of facts in support of proposed rule Part 7200.1300. This presentation establishes that among the educational standards the Board could have selected, the proposed regulation is needed and reasonable.¹⁰²

B. Conflicts of Interest

109. Several commentators argued that the rulemaking process as to the residency requirements was tainted because two Members of the Board of Psychology have associations with Cappella University, an institution that offers on-line course work in psychology.¹⁰³

110. As detailed in the Board's September 5 comments, Board Chairman Christopher Bonnell, who is an employee of Cappella University, recused himself from deliberations on the rule. While Vice-Chairman Jeffrey Leichter had been a faculty member at Cappella University, he has not had a professional relationship with the university for a period of five years. Under such circumstances, the Board's residency rule was not developed in contravention of Minn. Stat. § 148.90, subd. 2 (b)(5).¹⁰⁴

C. Other Items

111. As part of the public comment process, a number of stakeholders urged the Board to adopt still other revisions to Part 7200. In each instance, the Board's rationale in declining to make the requested revisions to its rules was well grounded in this record and reasonable.

¹⁰⁰ See, Testimony of Dr. Sherrill Lemmerman (August 9, 2012).

¹⁰¹ See, e.g., Testimony of Dr. William Robiner (August 9, 2012); Testimony of Dr. Trisha A. Stark (August 9, 2012); Comments of Dr. Daniel Christensen and Dr. Steven Vincent (August 15, 2012); Comments of the Minnesota Association of Accredited Psychology Internship Centers (August 24, 2012); Comments of Sue Abderholden (August 29, 2012).

¹⁰² See, Minn. Stat. §§ 14.14 and 14.50.

¹⁰³ See, Comments of Dr. William Robiner (August 23, 2012); Comments of the Minnesota Association of Accredited Psychology Internship Centers (August 24, 2012).

¹⁰⁴ Compare, Board Comments, at 21 and 24 (September 5, 2012) with Minn. Stat. § 148.90, subd. 2 (b)(5) ("A public member of the board shall represent the public interest and shall not ... have conflicts of interest or the appearance of conflicts with duties as a board member").

CONCLUSIONS

1. The Minnesota Board of Psychology gave notice to interested persons in this matter.

2. Except as noted in Findings 16, 17, 20, 23 and 25, the Board has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule. The Administrative Law Judge concludes that the cited omissions are harmless errors under Minn. Stat. § 14.15, subd. 5.

3. The Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).

4. The Notice of Hearing, the proposed rules and Statement of Need and Reasonableness (SONAR) complied with Minn. R. 1400.2080, subp. 5.

5. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14 and 14.50.

6. The modifications to the proposed rules suggested by the Administrative Law Judge after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. § 14.05, subd. 2, and 14.15, subd. 3.

7. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted.

Dated: October 9, 2012

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

Reported: Digitally Recorded.

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rules. The agency may then adopt the final rules or modify or withdraw its proposed rule. If the Minnesota Board of Psychology makes any changes in the rule, it must submit the rule to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit a copy of the Order Adopting Rules to the Chief Administrative Law Judge. After the rule's adoption, the OAH will file certified copies of the rules with the Secretary of State. At that time, the Minnesota Board of Psychology must give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.